TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 659

THE CINCINNATI SOAP COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 16, 1937.

CERTIORARI GRANTED FEBRUARY 15, 1937.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 18, 1937.

—8734-C

District Court of the United States

For the Southern District of Ohio, Western Division

No. 5049.

The Cincinnati Soap Company, a corporation under the laws of Ohio,

Plaintiff,

vs.

The United States of America,

Defendant.

PETITION

(Filed July 6, 1936.)

To the United States District Court for the Southern District of Ohio, Western Division:

The petition of The Cincinnati Soap Company respectfully shows:

I.

That the petitioner, The Cincinnati Soap Company, is a corporation under the laws of the State of Ohio, with its principal office and place of business at Cincinnati, Ohio, the same being in the Southern District of Ohio, Western Division.

II.

That this suit is brought against the United States of America under the laws of the United States, and is for the recovery of a sum of money, called a processing tax, imposed by Section 602½ of the Revenue Act of 1934 (C. 277, 48 Stat. 763), upon the processing by plaintiff of coconut oil, which sum of money is hereby alleged to have been illegally assessed and to have been illegally collected by the Collector of Internal Revenue at Cincinnati, Ohio. A copy of the relevant sub-sections (a), (b) and (f) of said Section 602½ is, for convenience, attached to the petition.

The jurisdiction of this Court is based upon paragraph 20 of Section 24 of the Judicial Code as amended February 24, 1925 (43 Stat. 972, C. 309, 28 U. S. C. A. Sec. 41 [20]) whereby concurrent jurisdiction with the United States Court of Claims is conferred upon District Courts of the United States for the recovery of internal revenue taxes.

Petition.

III.

That the claim of the petitioner is for a refund of the sum of Nine Hundred and Ninety-five and 85/100 ($995.85) Dollars collected from it by the Collector of Internal Revenue at Cincinnati, Ohio. As required by said Section 602½ of the Revenue Act of 1934, petitioner did on the 28th day of February, 1935 make a return, on the form prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, stating that in the month of January, 1935, it had used in the manufacture of soap intended for sale 33,195 pounds of coconut oil, which coconut oil was wholly the production of the Philippine Islands; and together with said return petitioner did pay said sum of $995.85 to the said Collector of Internal Revenue, which sum was three (3) cents per pound upon said Philippine coconut oil as prescribed by said section of said Revenue Act of 1934. For abbreviation the expression "Philippine coconut oil" as used in this petition, will signify coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production.

On January 7, 1936 petitioner filed with the Bureau of Internal Revenue its claim for the refund of said $995.85 (a copy of which claim is attached to this petition), which claim was rejected by the Commissioner of Internal Revenue on the 14th day of May, 1936, the following beig the Commissioner's stated grounds for such rejection:

> "Reference is made to your claim for the refund of $995.85, representing tax paid under the provisions of Section 602½ of the Revenue Act of 1934 on the first domestic processing of coconut oil during the month of January 1936.
>
> "You contend that the amount was erroneously paid for the reason that the tax imposed under section 602½ of the Revenue Act of 1934 does not fall within the taxing power of Congress and is therefore unconstitutional.
>
> "You are advised that it is the province of this office to administer laws as enacted by Congress and it is without authority to pass upon the constitutionality of such laws. Inasmuch as you have set forth no other contention in support of your claim for refund on which consideration can be given, it is the opinion of the Bureau that the tax was correctly paid.
>
> "Your claim is therefore rejected in full."

Petition.

IV.

The petitioner is and, at the time of said payment and for many years previous thereto, was in the business of manufacturing toilet and other soaps, with its manufacturing plant located exclusively at Dayton, Ohio, and its manufacture of soap, including the use of Philippine coconut oil in such manufacture, took place exclusively at said manufacturing plant and was and is exclusively intrastate in character and exclusively within the State of Ohio. In January 1935, as well as before and since said month, Philippine coconut oil was and has been an essential ingredient of a large proportion of the soaps made and sold by it, and in January 1935, as well as before and since, petitioner was and has been unable to make use of any substitute for such coconut oil in the manufacture of said large proportion of the soaps upon which its business was built and conducted and was and has been dependent. Coconut oil contains lauric acid, which is the element causing soap to lather freely.

V.

Philippine coconut oil, either in liquid form or in the solid form of copra, when intended for use in the United States is shipped from the Philippine Islands to ports on the Atlantic and Pacific oceans in tank or other ocean-going ships and consigned to the dealers in such oil. It is unloaded from the said ships and delivered to said dealers at said ports, and when so delivered the importation of such oil and the transportation thereof from the Philippine Islands to the United States terminates. For the filling of orders from their customers, said dealers place the oil from time to time in railroad tank cars in which it is transported by rail from the plants or warehouses of the dealers to the plants or warehouses of the soap manufacturers or other users of the oil. These manufacturers and other users unload these tank cars delivered to them respectively and place the oil in their own storage tanks or other receptacles in their own respective plants, and thereupon the interstate transportation of the oil terminates.

All of the above facts concerning the importation and transportation of the oil apply to and were true of the oil used by the petitioner in January 1935, upon which use said $995.85 was imposed, as well as of all other Philippine coconut oil used by the petitioner in its manufacture of soap. The said oil was purchased from two dealers, one located at Edgewater, New Jersey and the

other at West Berkeley, California, and was received by the petitioner in tank railroad cars into which it had been placed by said dealers respectively at their plants in said Edgewater, New Jersey or West Berkeley, California, and had been delivered to petitioner in said tank cars at its aforesaid soap manufacturing plant at Dayton, Ohio, where said oil was unloaded from the tanks cars and placed in storage tanks located in said manufacturing plant at Dayton, Ohio, from which storage tanks it was drawn from time to time for use in the process of manufacturing soap. The importation and transportation of the oil from the Philippine Islands had completely terminated at Edgewater, New Jersey or West Berkeley, California at the time at which said dealer took from the ships the oil of which a part was later sold and delivered to petitioner and placed same in its own plant or warehouse at Edgewater or West Berkeley; and the interstate commerce or transportation of the oil which was sold and shipped by rail to the petitioner terminated upon the arrival at petitioner's Dayton plant of the tank cars into which it had been placed by said dealers at Edgewater or West Berkeley; and the use of the oil in the manufacture of soap did not and could not commence until after the complete termination of both the foreign commerce and transportation and the interstate commerce and transportation of the oil. None of said oil whatever was imported by petitioner from the Philippine Islands or purchased by the petitioner from any grower thereof or dealer therein located in the Philippine Islands.

There is some Philippine coconut oil imported into the United States and used therein without a domestic processing which would subject it to the "tax" provided in Section 602½ of the Revenue Act of 1934.

VI.

Petitioner alleges that it was in January 1935 and before and after that month and is now unable to recover the amounts imposed upon it by the provisions of said Section 602½ relating to the processing of Philippine coconut oil by increasing prices at which it sold or sells its soaps. Such products were sold and are salable only in highly competitive markets; and the selling prices thereof were not and are not and could not and cannot be controlled by the petitioner, but were and are in fact controlled by competitive conditions in the industry. If petitioner undertook to increase the prices of its soaps

to the extent represented by the amount of such processing taxes, it would have been and would be unable to dispose of such products at such increased prices because of market and competitive conditions in the soap industry over which petitioner had and has no control. The three (3) cents per pound imposed by said Section 602½ constituted about thirty (30%) percent of the total manufacturing cost of petitioner's coconut oil soaps. The conditions of and situation in the soap industry and trade were at the time of the enactment of said Section 602½ and have since been such that the addition to its production costs imposed by said section upon Philippine coconut oil made and has continued to make it impossible for petitioner to conduct its business at a profit and subjected petitioner's business to an operating loss. Previous to the effectiveness of said Section 602½, petitioner had been able to conduct its business at a substantial profit, but since the effectiveness of said section it has suffered a substantial operating loss, notwithstanding that its business has been prudently, economically and efficiently managed and conducted; and this loss results from the provisions of said Section 602½ imposing upon the first domestic processing of Philippine coconut oil "a tax of 3 cents per pound to be paid by the processor".

VII.

Petitioner further states that the Philippine Independence Act (Act of March 24, 1934, 48 U. S. C. A., #1231 to 1247) has been in full force and effect from and after May 1, 1934, and has been in full force and effect since the enactment of said Section 602½ of the Revenue Act of 1934 and is now in full force and effect.

The constitution for the government of the Commonwealth of the Philippine Islands has been formulated and drafted; has been submitted to the President of the United States; has been certified by the President to conform substantially with the provisions of the Philippine Independence Act (Act of March 24, 1934, 48 U. S. C. A., Sections #1231 to 1247); has been submitted to the people of the Philippine Islands at an election; has been ratified at said election by a majority of the votes cast; an election has been held to select officers of the government of the Commonwealth of the Philippine Islands provided for in said constitution of that Commonwealth; a Proclamation has been issued by the President of the United States announcing the results of the election;

the new government of the Philippine Islands has been inaugurated and taken office, and has entered upon its rights, privileges, powers, and duties as provided by the said constitution of the Commonwealth of the Philippine Islands and by the said Philippine Independence Act.

That petitioner has been informed and believes, and therefore avers the fact to be that the Philippine Islands are no longer an insular possession of the United States but are now a separate nation and commonwealth, with its own constitution, form of government, legislature and elective officers, and have been recognized as such by the United States.

The Philippine Government has not provided by any law for any subsidy to be paid to the producers of copra, coconut oil or allied products.

VIII.

As required by said section of the Revenue Act of 1934, the said $995.85 and all the other sums paid by petitioner upon the processing of Philippine coconut oil since said Section 602½ took effect and all sums similarly paid by other soap manufacturers and other processors of Philippine coconut oil have been placed in a separate fund held exclusively for the benefit of and to be paid over in its entirety to the Treasury of the Philippine Islands.

IX.

Petitioner further alleges that the object and purpose of Congress in imposing, upon the processing of Philippine coconut oil, the so-called taxes mentioned in said Section 602½ of the Revenue Act of 1934 was not to raise revenues with which to pay the debts or provide for the common defense or general welfare of the United States or for the support of or operation of the Government of the United States, but that said object and purpose of said section, as appears on the face thereof as well as from the proceedings in Congress while said section was pending, was to regulate the volume of production and the selling prices of certain vegetable oils and fats produced within the United States by compelling soap manufacturers and other manufacturers using coconut oil to substitute said domestic vegetable oils in place of coconut oil in the manufacture of their soaps. The said Section 602½ is a statutory plan to regulate intrastate production and manufacture.

X.

All of the provisions of said Section 602½ relating to Philippine coconut oil, namely the so-called processing tax, the holding of the proceeds thereof as a separate fund, the payment of such separate fund to the Treasury of the Philippine Islands and the cessation of such payment after the Philippine Government provides by law for a subsidy to producers of copra and coconut oil, are interrelated, intertwined, interdependent and integrated parts of one legislative plan and of one scheme of legislation and are therefore inseparable.

XI.

Petitioner further states that under the provisions of the said Section 602½ of the Revenue Act of 1934, the moneys required to be paid by the petitioner on its processing of Philippine coconut oil is required to be placed in a separate fund and paid over to the Treasury of the Philippine Islands. Section 8 of Article I of the Constitution of the United States provides that "Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defense and general welfare of the United States". A tax laid and collected solely and entirely to be paid to the Treasury of the Philippine Islands is not for the payment of the debts of nor for the common defense of nor for the general welfare of the United States and consequently the laying of said tax on and collection thereof from the petitioner and others for the payment over thereof into the Treasury of the Philippine Islands does not come within the constitutional scope of the taxing power of Congress, and said Section 602½, in all its provisions relating to Philippine coconut oil, including the laying and collection of processing taxes, is unconstitutional and void and in violation of said Section 8 of Article I.

XII.

The processing taxes on coconut oil imposed by said Section 602½ of the Revenue Act of 1934 were not taxes or excises laid or collected for the purpose of the payment of the debts of the United States or for the purpose of providing for the common defense or general welfare of the United States, and were not laid or collected for the support of the Government of the United States, but were in fact laid and collected for payment to and the

unrestricted use by and benefit of the Government of the Philippine Islands; and therefore the said taxes are not authorized by but on the contrary are violative of the provisions of Section 8 of Article I of the Constitution of the United States, and for the same reasons are violative of the Fifth Amendment.

XIII.

Plaintiff further states that the laying and collection of the processing tax provided in said Section 602½ upon Philippine coconut oil was not for the purpose of raising revenues with which to pay the debts or provide for the common defense or general welfare of the United States or for the support of the Government of the United States, but was for the purpose of imposing a special and heavy burden upon soap manufacturers and other processors and users of Philippine coconut oil in the United States for the special benefit and privilege of the growers, processors and users of other oils made from products grown in the United States, and constitute an expropriation of money from one group of citizens of the United States, namely, the manufacturers of soap and other processors of Philippine coconut oil, for the benefit of another group, and, for these reasons, said provisions of said Section 602½ are in violation of Section 8 of Article I of the Constitution of the United States and of the Fifth Amendment of the Constitution of the United States.

XIV.

The processing "tax" on Philippine coconut oil as imposed by Section 602½ is in violation of the Fifth Amendment, in that one group of citizens of the United States, being petitioner and others similarly situated, are deprived of their property and subjected to an excessive burden not for the general revenues of the Government of the United States or for the support of the Government of the United States, but for the exclusive benefit of and exclusive payment over to another group, namely, the government of the Philippine Islands.

XV.

As the entire proceeds of the said processing "tax" on Philippine coconut oil, regardless of the amount thereof, are to be paid over to the Philippine Treasury, the tax bears no reasonable relationship whatever to nor

represents any exercise of reason or discretion in the determination of the needs of the Philippine Islands or the amount required for whatever purposes the funds paid over are intended to serve, and said tax, if it were to be treated as an exercise of the taxing power, is completely arbitrary and the heavy burden it imposed on petitioner and others similarly situated was a deprivation of property without due process of law and therefore violative of the Fifth Amendment.

XVI.

Petitioner further states that the laying and collection of the "tax" provided in said Section 602½ upon the processing of Philippine coconut oil was not for the purpose of raising revenues with which to pay the debts or provide for the common defense or general welfare of the United States or the support of the Government, but represent and are part of a plan, under the guise of a tax statute, to regulate and control petitioner's intrastate business of manufacturing soap by compelling it and other manufacturers using coconut oil to discontinue in whole or in part the use of coconut oil and to substitute therefore oils and fats produced domestically by dairy farmers and other domestic agricultural producers; and therefore said Section 602½, or that part of it which lays a processing tax upon the use of Philippine coconut oil by the petitioner and other soap manufacturers in the United States, is in contravention of the Ninth and Tenth Amendments of the Constitution of the United States, in that it is a regulation of intrastate manufacture and therefore a regulation by Congress of a subject outside of its constitutionally granted powers.

XVII.

Petitioner further states that the laying and collection of the "tax" provided in said Section 602½ upon the proceessing of Philippine coconut oil was not for the purpose of raising revenues with which to pay the debts or provide for the common defense of general welfare of the United States or the support of the Government, but represent and are a part of a plan, under the guise of a tax statute, to regulate the intrastate domestic production of and the prices of certain vegetable oils; and therefore said section 602½, or that part of it which lays a processing tax upon the use of Philippine coconut oil

by the petitioner and other soap manufacturers in the United States, is in contravention of the Ninth and Tenth Amendments of the Constitution of the United States, in that it is a regulation of intrastate agricultural production and therefore outside of the constitutionally granted powers of Congress.

XVIII.

In laying such a tax on Philippine coconut oil as is provided for in said Section 602½ and in providing that the same shall be held as a separate fund and paid to the Treasury of the Philippine Islands, the Congress has violated the provisions of Clause 7, Section 9, of Article I of the Constitution of the United States.

XIX.

The processing tax on Philippine coconut oil imposed by said Section 602½ of the Revenue Act of 1934 is not a tax or excise laid or collected for the purpose of the payment of the debts of the United States or for the purpose of providing for the common defense or general welfare of the United States or for the support of the Government of the United States; and the imposition thereof exclusively upon the manufactures of soap and other processors of Philippine coconut oil constitutes an inequality and a deprivation of property without due process of law violative of the Fifth Amendment.

XX.

The so-called "tax" on Philippine coconut oil cannot be upheld as a regulation of foreign or interstate commerce since all commerce in the oil ceases before the processing begins and the processing itself is exclusively intrastate.

XXI.

For any, each and every of the above reasons and upon the facts and the law, the collection of the said $995.85 from your petitioner was erroneous and illegal, and your petitioner is entitled to a refund of the said sum of $995.85, together with interest thereon at 6% per annum from the 28th day of February, 1935, the date said sum was paid by the petitioner, and that the United States is indebted to the petitioner for that sum with said interest.

Petition.

WHEREFORE, your petitioner prays for a judgment against the United States of America upon the facts and law for the principal sum of Nine Hundred and Ninety-five and 85/100 ($995.85) Dollars, with interest at 6% from the 28th day of February, 1935, together with its reasonable costs and disbursements and for such other and further relief in the premises as may be just.

Moulinier, Bettman & Hunt,
Attorneys for Petitioner.

(Duly verified)

Sec. 602½. Processing Tax on Certain Oils.

"(a) There is hereby imposed upon the first domestic processing of coconut oil, sesame oil, palm pal kernel oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. There is hereby imposed (in addition to the tax imposed by the preceding sentence) a tax of 2 cents per pound to be paid by the processor, upon the first domestic processing of coconut oil with respect to which oil there has been no previous first domestic processing, except that the tax imposed by this sentence, shall not apply when it is established, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, that such coconut oil (whether or not contained in such a combination or mixture), (A) is wholly the production of the Philippine Islands or any other possession of the United States, or (B) was produced wholly from materials of the growth or production of the Philippine Islands or any other possession of the United States, or (C) was brought into the United States on or before the 30th day after the date of the enactment of this Act or produced from materials brought into the United States on or before the 30th day after the date of the enactment of this Act, or (D) was purchased under a bona fide contract entered into prior to April 26, 1934, or produced from materials purchased under a bona fide contract entered into prior to April 26, 1934. All taxes collected under this section with respect to coconut oil wholly of

Sec. 602½. Processing Tax on Certain Oils (Continued).

Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but it at any time the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection. For the purposes of this section the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate.

"(b) Each processor required to pay the tax imposed by this section shall make monthly returns under oath in duplicate and pay the tax to the collector of internal revenue for the district in which is located his principal place of business, or if he has no principal place of business in the United States, then to the collector of internal revenue at Baltimore, Maryland. Such returns shall contain such information and be made at such times and in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe. The tax shall, without assessments by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum per month from the time the tax became due until paid.

• • • •

(f) All provisions of law (including penalties) applicable in respect of taxes imposed by section 600 of the Revenue Act of 1926, shall, in so far as applicable and not inconsistent with this section, be applicable in respect of the taxes imposed by this section."

CLAIM.

The Collector will indicate in the below the kind of claim filed, and fill in the certificate on the reverse side.

Refund of Tax Illegally Collected.

Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Ohio
County of Hamilton, ss:

The Cincinnati Soap Company, New Telephone Bldg., Seventh & Elm Sts. Cincinnati, O.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named and that the facts given below are true and complete.

1. District in which return (if any) was filed Southern District of Ohio at Cincinnati, O.
2. Period (if or income tax, make separate form for each taxable year) from 1/1/35 to 1/31/35.
3. Character of assessment or tax, processing tax on oils.
4. Amount of assessment, $995.85; dates of payment February 27, 1935.
5. Date stamps were purchased from the Government.
6. Amount to be refunded $995.85.
7. Amount to be abated (not applicable to income or estate taxes) $
8. The time within which this claim may be legally filed expires, under Section 3228 USRS of the Revenue Act of 19—, on Feb. 27, 1939.

The deponent verily believes that this claim should be allowed for the following reasons:

The coconut oil upon whose processing the said tax was levied and paid was wholly the production of the Philippine Islands and was produced wholly from materials of the growth or production of the Philippine Islands. Consequently, under the provisions of Section 602½ of the Revenue Act of 1934, the said tax paid by The Cincinnati Soap Company is required to be placed in a separate fund and paid to the Treasurer of the Philippine Islands. Section 8 of Article I of the Constitution of the United States provides that the "Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the com-

mon defense and general welfare of the United States". A tax laid and collected for payment to the Treasury of the Philippine Islands does not come within the scope of said taxing power, and consequently the laying and collection of the aforesaid tax on and from the Cincinnati Soap Company was not within the constitutional power of Congress.

Furthermore, the laying and collection of said tax was not for the purpose of raising revenues with which to pay the debts or provide for the common defense and general welfare of the United States, but was for the purpose of imposing a special burden upon the users of coconut oil in the United States for the special benefit and privilege of the growers, processors and users of other oils made from products grown in the United States. Furthermore, said laying and collection of said tax constitutes a regulating of claimant's intra-state business of manufacturing its products, the purpose and intent of said section being to force claimant and other soap manufacturers to discontinue in whole or in part the use of the oils made taxable in said section of the Revenue Act of 1934 and to substitute therefore oil and fats produced domestically by farmers and other interests in the United States. Consequently, the provisions of said Section 602½ of the Revenue Act of 1934 are in violation of Section 8 of Article I of the Constitution of the United States, also of the Fifth Amendment of the Constitution of the United States and also of the Tenth Amendment of the Constitution of the United States.

As the laying and collection of the said tax do not fall within the taxing power of Congress and violate the Constitution as aforesaid, the said tax, for which this claim of refund is made, was erroneous and illegal.

Sworn to and subscribed before me this
———— day of January, 1936.
Ludwig Abel, Notary Public.

Signed The Cincinnati Soap Company
Albert M. Steiner,
Vice President.

AFFIDAVIT.

(Filed September 28, 1936.)

State of Ohio,
Hamilton County, ss:

Alfred Bettman, being first duly sworn, says that he is a member of the firm of Moulinier, Bettman & Hunt, attorneys for The Cincinnati Soap Company, plaintiff in the above captioned case; that on the 28th day of September, 1936, he caused a copy of the Amendment to Petition as filed in the above captioned case to be served upon Hon. Francis C. Canny, the United States District Attorney for the Southern District of Ohio, by delivering such copy to said United States District Attorney personally in his office in the United States Government Building in Cincinnati, Ohio, that he did mail by registered letter a copy of said Amendment to Petition to the Attorney General of the United States, by himself placing such copy, together with a letter of transmissal, in an envelope addressed to The Attorney General, Washington, D. C., sealing said envelope, placing the necessary postage thereon and registering and mailing same from the General Post Office at Cincinnati, Ohio.

Alfred Bettman.

Sworn to and subscribed before me this 28th day of September, 1936.

Kay Hughes, Notary Public,
in and for Hamilton County, Ohio.
My commission expires Jan. 3, 1937.

AFFIDAVIT.

(Filed July 6, 1936.)

State of Ohio,
Hamilton County, ss:

Alfred Bettman, being first duly sworn, says that he is a member of the firm of Moulinier, Bettman & Hunt,

attorneys for The Cincinnati Soap Company, plaintiff in the above captioned case; that on the 6th day of July, 1936, he caused a copy of the petition as filed in the above captioned case to be served upon Hon. Francis C. Canny, the United States District Attorney for the Southern District of Ohio, by delivering such copy to said United States District Attorney personally in his office in the United States Government Building in Cincinnati, Ohio; that he did mail by registered letter a copy of said petition to the Attorney General of the United States, by himself placing such copy, together with a letter of transmissal, in an envelope addressed to Honorable Homer S. Cummings, Attorney General of the United States, sealing said envelope, placing the necessary postage thereon and registering and mailing same from the General Post Office at Cincinnati, Ohio.

Alfred Bettman.

Sworn to and subscribed before me this 6th day of July, 1936.

Kay Hughes, Notary Public
in and for Hamilton County, O.
My commission expires Jan. 2, 1937.

DEMURRER.

(Filed July 23, 1936.)

Comes now the United States of America, defendant in the above entitled cause, by Francis C. Canny, United States Attorney in and for the Southern District of Ohio, Western Division, and Assistant United States Attorney for said District, its attorneys, and respectfully demurs to plaintiff's complaint filed herein and for grounds of said demurrer says:

Demurrer.

I.

That said complaint fails to state a cause of action against this defendant because it shows that the tax sought to be recovered was lawfully and correctly assessed and collected under valid and constitutional laws of the United States.

Respectfully submitted,

Francis C. Canny,
United States Attorney.
Robert E. Marshall,
Assistant United States Attorney.

AMENDMENT TO PETITION.

(Filed September 28, 1936.)

Now comes the petitioner, The Cincinnati Soap Company, and for amendment and supplement to its petition in this action, particularly that portion thereof numbered III, and affirming and realleging all of the allegations of said petition, hereby respectfully shows that on July 6, 1936 it did file with the Bureau of Internal Revenue its amended claim for the refund of the said Nine Hundred and Ninety-five and 85/100 ($995.85) Dollars, a copy of which amended claim is hereto attached, and which amended claim was rejected by the Commissioner of Internal Revenue on the 28th day of July, 1936, the following being the Commissioner's stated grounds for such rejection:

> "Reference is made to your claim for refund of $995.85, representing tax paid under the provisions of Section 602½ of the Revenue Act of 1934, on the first domestic processing of coconut oil during the month of January 1935.

Amendment to Petition.

The claim is rejected in full for the reason that it is a duplicate of claim No. 35168 which was rejected on May 14, 1936."

Moulinier, Bettman & Hunt.
Attorneys for Petitioner.

(Duly verified)

AMENDED CLAIM.

To be Filed with the Collector where Assessment was Made or Tax Paid.

State of Ohio,
County of Hamilton, ss:

Name of taxpayer or purchaser of stamps: The Cincinnati Soap Company.

Business address: New Telephone Bldg., Seventh & Elm Sts., Cincinnati, Ohio.

The deponent, being duly sworn according to law, deposes and says that this amended statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Southern District of Ohio at Cincinnati, Ohio.
2. Period (if for income tax, make separate form for each taxable year) from 1/1/35 to 1/31/35.
3. Character of assessment or tax: Processing tax on oils.
4. Amount of assessment, $995.85; date of payment, February 27, 1935.
5. Date stamps were purchased from the Government:
6. Amount to be refunded: $995.85.
7. Amount to be abated (not applicable to income or estate taxes):
8. The time within which this claim may be legally filed expires, under Section 3228 USRS of the Revenue Act of 19...., on February 27, 1939.

The deponent verily believes that this claim should be allowed for the following reasons:

The coconut oil upon whose processing the said tax was levied and paid was wholly the production of the Philippine Islands and was produced wholly from materials of the growth or production of the Philippine Islands. Consequently, under the provisions of Section 602½ of the Revenue Act of 1934, the said tax paid by The Cincinnati Soap Company is required to be placed

in a separate fund and paid to the Treasurer of the Philippine Islands. Section 8 of Article I of the Constitution of the United States provides that the "Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defense and general welfare of the United States." A tax laid and collected for payment to the Treasury of the Philippine Islands does not come within the scope of said taxing power, and consequently the laying and collection of the aforesaid tax on and from the Cincinnati Soap Company was not within the constitutional power of Congress.

Furthermore, the laying and collection of said tax was not for the purpose of raising revenues with which to pay the debts or provide for the common defense and general welfare of the United States, but was for the purpose of imposing a special burden upon the users of coconut oil in the United States for the special benefit and privilege of the growers, processors and users of other oils made from products grown in the United States. Furthermore, said laying and collection of said tax constitutes a regulating of claimant's intra-state business of manufacturing its products, the purpose and intent of said section being to force claimant and other soap manufacturers to discontinue in whole or in part the use of the oils made taxable in said section of the Revenue Act of 1934 and to substitute therefor oil and fats produced domestically by farmers and other interests in the United States. Consequently, the provisions of said Section 602½ of the Revenue Act of 1934 are in violation of Section 8 of Article I of the Constitution of the United States, also of the Fifth Amendment of the Constitution of the United States, and also of the Tenth Amendment of the Constitution of the United States.

Furthermore, the laying and collection of said tax was not for the purposes of the payment of the debts of the United States or providing for the common defense or general welfare of the United States or for the support of the Government of the United States, but was laid and collected for payment to and the unrestricted use by and benefit of the government of the Philippine Islands, and therefore said tax was not authorized by and was violative of the provisions of Section 8 of Article I of the Constitution of the United States and of the Fifth Amendment of the Constitution.

Furthermore, the laying and collection of said tax was in violation of the Fifth Amendment of the Constitution of the United States, in that one group, including this

claimant, is deprived of its property and subjected to an excessive burden not for the general revenue of the Government of the United States or for the support of that Government, but for the exclusive benefit of and exclusive payment over to another group, namely the government of the Philippine Islands.

Furthermore, as the entire proceeds of said tax, regardless of the amount thereof, are to be paid over to the Philippine Treasury, the tax bears no reasonable relation whatever to or represents any exercise of reason or discretion in the determination of the needs of the Philippine Islands or the amount required for whatever purpose funds paid over are intended to serve, and said tax is therefore completely arbitrary and a deprivation of property without due process of law and violative of the Fifth Amendment of the Constitution of the United States and Section 8 of Article I of the said Constitution.

Furthermore, said tax was not for the purpose of raising revenues with which to pay the debts or provide for the common defense or general welfare of the United States or support of the Government, but represented and was part of a plan under the guise of a tax statute to regulate and control claimant's intrastate business in manufacture of soap by compelling claimant and other manufacturers to discontinue in whole or in part the use of coconut oil and to substitute oils and fats produced domestically by the dairy farmers and other agricultural producers, and therefore the laying and collection of said tax was in contravention of the Ninth and Tenth Amendments of the Constitution of the United States, in that it was a regulation of intrastate manufacture and therefore a regulation by Congress of a subject outside of itse constitutionally granted powers.

Furthermore, the laying and collection of said tax was not for the purpose of raising revenues with which to pay the debts or provide for the common defense or general welfare of the United States or the support of the Government, but was represented and was part of a plan under the guise of a tax statute to regulate the intrastate domestic production of and the prices of certain domestic vegetable oils and therefore was in contravention of the Ninth and Tenth Amendments of the Constitution of the United States, in that it was a regulation of intrastate agricultural production and therefore outside of the constitutionally granted powers of Congress.

Furthermore, the laying and collection of said tax and in the providing that the same shall be held as a separate fund and paid to the Treasury of the Philippine Islands,

has violated the provisions of Clause 7, Section 9 of Article I of the Constitution of the United States.

Furthermore, in the laying and collection under Section 602½ of the Revenue Act of 1934 of said tax upon the manufacturers of soap and other processors of Philippine coconut oil, the same constitutes an inequality and deprivation of property without due process of law violative of the Fifth Amendment of the Constitution of the United States.

Furthermore, said tax on Philippine coconut oil cannot be upheld as a regulation of foreign or intrastate commerce, since all commerce in the oil ceased before the processing began and the processing itself was exclusively intrastate.

As the laying and collection of the said tax do not fall within the taxing power of Congress and violate the Constitution as aforesaid, the said tax, for which this amended claim of refund is made, was erroneous and illegal.

Signed: The Cincinnati Soap Company
By Albert Steiner, Vice-President.

Sworn to and subscribed before me this 10th day of May, 1936.

Conrad Magrish, Notary Public.

DEMURRER TO PETITION AS AMENDED.

(Filed October 9, 1936.)

Now comes the United States of America, defendant in the above entitled cause, by Francis C. Canny, United States Attorney for the Southern District of Ohio, and Frederic W. Johnson, Assistant United States Attorney for said District, its attorneys, and respectfully demurs to plaintiff's petition as amended on September 26, 1936, and for grounds of said demurrer says:

I.

That said petition as so amended fails to state a cause of action against this defendant because it shows that

the tax sought to be recovered was lawfully and correctly assessed and collected under valid and constitutional laws of the United States.

Respectfully submitted.

Francis C. Canny,
United States Attorney.

Frederic W. Johnson,
Assistant United States Attorney.

ORDER SUSTAINING DEMURRER AND JUDGMENT FOR DEFENDANT.

(Filed January 5, 1937.)

This cause coming on to be heard this day upon the defendant's demurrer to the plaintiff's petition as amended, the Court upon full consideration thereof finds that the provisions of Section 602½ of the Revenue Act of 1934, imposing a tax upon the processing of coconut oil wholly of Philippine production or produced wholly from materials of Philippine growth or production, are valid and constitutional and that therefore said demurrer is well taken and the Court sustains the same; thereupon the plaintiff not asking to plead further.

IT IS THEREFORE ADJUDGED AND ORDERED that the plaintiff's petition as amended be and the same is hereby dismissed at plaintiff's costs.

To all of which plaintiff duly excepts.

Nevin,
United States District Judge.

Moulinier, Bettman & Hunt,
Attorneys for Plaintiff.

Frederic W. Johnson,
Assistant U. S. Attorney,
for Defendant.

DECISION ON DEMURRER.

(Filed January 5, 1937.)

NEVIN, District Judge:

On July 6, 1936, plaintiff herein filed its petition, and on September 28, 1936, filed an amendment thereto. The cause is now before the court on a demurrer, filed October 9, 1936, to the petition as amended.

Plaintiff prays for judgment against the United States, defendant herein, in the sum of $995.85, with interest thereon at 6% from the 28th day of February, 1935, plaintiff claiming that said amount is due it as a refund from monies erroneously and illegally collected from it on account of coconut oil processing taxes assessed and collected under Section 602½ of the Revenue Act of 1934, for the month of January, 1935.

Counsel argued the demurrer to the court orally and extensive and very interesting briefs have been filed by counsel for the respective parties. The last of these briefs were filed on December 4, 1936. Inasmuch as the case is before the court on defendant's demurrer, the proper allegations of the bill are assumed to be true and have been so considered by the court in arriving at its conclusion.

Subsequent to the filing of the briefs, counsel stated to the court that it is the desire of both sides to expedite the case and to have it determined as speedily as possible by this court. It was further stated by counsel that to that end the court was requested, if agreeable, merely to state its conclusion on the pending demurrer without writing an opinion. The court has, however, read and thoroughly considered the briefs and arguments.

Upon a consideration thereof, the court is of the opinion that the demurrer is well taken and that it should be and it is sustained upon the grounds set forth therein, to-wit, that the "petition as so amended fails to state a cause of action against this defendant because it shows that the tax sought to be recovered was lawfully and correctly assessed and collected under valid and constitutional laws of the United States," and for the reasons advanced in the brief of defendant in support of the demurrer.

An order may be drawn sustaining the demurrer and dismissing the petition as amended at plaintiff's costs.

Nevin, J.

Decision on Demurrer.

APPEARANCES:

For Plaintiff: Moulinier, Bettman & Hunt,
Cincinnati, Ohio.

For Defendant: Robert H. Jackson,
Assistant Attorney General.

Francis C. Canny,
U. S. Attorney.

Andrew D. Sharpe,
John Paul Jackson,
James E. Murphy,
Charles A. Horsky,
Special Assistants to the
Attorney General.

PETITION FOR APPEAL.

(Filed January 5, 1937.)

TO THE HONORABLE ROBERT R. NEVIN, JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION:

The above named plaintiff, feeling itself aggrieved by the order sustaining the demurrers of the defendant to the petition and the amendment to the petition of the plaintiff and by the judgment for defendant, made and entered in this cause on the 5th day of January, A. D. 1937, does hereby appeal from said order and judgment to the Circuit Court of Appeals for the Sixth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said order and judgment were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio.

Petition for Appeal.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made.

Moulinier, Bettman & Hunt,
Attorneys for The Cincinnati Soap Company, plaintiff.

The above petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of $100.00.

Nevin,
Judge, United States District Court for Southern District of Ohio, Western Division.

ASSIGNMENT OF ERRORS.

(Filed January 5, 1937.)

And, now, on this the 5th day of January, A. D., 1937, came the plaintiff by its attorneys and says that the order sustaining the demurrer of the defendant to the petition of the plaintiff as amended and the judgment for defendant entered in the above cause on the 5th day of January, A. D. 1937, are erroneous and unjust to the plaintiff:

FIRST: In sustaining the demurrer of the defendant to the petition of the plaintiff as amended.

SECOND: In rendering judgment for the defendant upon the petition of plaintiff as amended and the demurrer of defendant thereto.

THIRD: In holding and determining the provisions of Section 602½ of the Revenue Act of 1934 which imposed upon the first domestic processing of coconut oil wholly of Philippine production or produced wholly from materials of Philippine growth or production a tax of three (3) cents per pound is valid and constitutional.

Assignment of Errors.

FOURTH: In failing to hold and determine that the provisions of Section 602½ of the Revenue Act of 1934 relating to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, including the imposition of a tax upon the processing of such Philippine oil, are invalid and unconstitutional.

FIFTH: In failing to determine and hold that said provisions of said Section 602½ of the Revenue Act of 1934 relating to a processing tax upon Philippine coconut oil are invalid and unconstitutional for the reason that they do not fall within and are beyond the scope of the powers granted to Congress by the Constitution of the United States.

SIXTH: In failing to hold and determine that said provisions of said Section 602½ of the Revenue Act of 1934 are invalid and unconstitutional because they constitute an invalid exercise of the powers of Congress under the Constitution of the United States.

SEVENTH: In failing to hold and determine that said provisions of said Section 602½ of the Revenue Act of 1934 are unconstitutional and invalid for the reason that they do not fall within the taxing power of Congress granted by the Constitution of the United States in Section 8 of Article I of the Constitution of the United States.

EIGHTH: In failing to hold and determine that said provisions of Section 602½ of the Revenue Act of 1934 are invalid and unconstitutional in that they constitute an unconstitutional delegation by Congress of its legislative powers.

NINTH: In failing to hold and determine that said provisions of said section of the Revenue Act of 1934 violate the Fifth Amendment of the Constitution of the United States, and are consequently invalid and unconstitutional.

TENTH: In failing to hold and determine that said provisions of the Revenue Act of 1934 violate the Tenth Amendment of the Constitution of the United States and are therefore invalid and unconstitutional.

ELEVENTH: In failing to hold and determine that said provisions of the Revenue Act of 1934 violate Clause 7 of Section 9 of Article I of the Constitution of the United States and are therefore invalid and unconstitutional.

Assignment of Errors.

TWELFTH: In failing to overrule the demurrer of the defendant to the petition of plaintiff as amended.

WHEREFORE, the plaintiff prays that said order sustaining demurrer and said judgment for the defendant be reversed, and that the Circuit Court of Appeals render upon the record a judgment for the plaintiff as prayed for in the petition, or other proper judgment on the record.

Moulinier, Bettman & Hunt,
Attorneys for
The Cincinnati Soap Company, Plaintiff.

BOND ON APPEAL

(Filed January 5, 1937.)

KNOW ALL MEN BY THESE PRESENTS: That we, The Cincinnati Soap Company, as principal, and The Aetna Casualty and Surety Company, as surety, acknowledge ourselves to be jointly indebted to The United States of America, appellee in the above cause, in the sum of $100.00 Dollars, conditioned that, whereas on the 5th day of January, A. D. 1937, in the District Court of the United States for the Southern District of Ohio, Western Division, in a suit depending in that court, wherein The Cincinnati Soap Company was plaintiff and The United States of America was defendant, numbered on the Law Docket as 5049, an order sustaining demurrers and judgment for defendant was rendered against said The Cincinnati Soap Company, and the said The Cincinnati Soap Company having obtained an appeal to the United States Circuit Court of Appeals for the Sixth Circuit and filed a copy thereof in the office of the Clerk of the Court to reverse said order and judgment, and a citation directed to the said The United States of America, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be held in the City of Cincinnati, Ohio, on the 4th day of February, 1937 next.

Bond on Appeal.

Now, if the said The Cincinnati Soap Company shall prosecute its appeal to effect and answer all costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

The Aetna Casualty & Surety Company
By John P. Ryan, Attorney-in-Fact.
Surety. (Seal)

Approved January 5, 1937.
Nevin, Judge,
United States District Court for the
Southern District of Ohio, Western Division.

THE AETNA CASUALTY AND SURETY COMPANY
Hartford, Connecticut

Certificate of Authority of Attorney (s) -in-Fact.

KNOW ALL MEN BY THESE PRESENTS, That THE AETNA CASUALTY AND SURETY COMPANY, a corporation duly organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, County of Hartford, State of Connecticut, hath made, constituted and appointed, and does by these presents make, constitute and appoint John P. Ryan, of Cincinnati, Ohio, its true and lawful Attorney (s), with full power and authority hereby conferred to sign, execute and acknowledge, for The Aetna Casualty and Surety Company, as surety, by his sole signature and act any and all bonds, undertakings, and other writings obligatory in the nature of a bond, and to bind The AETNA CASUALTY AND SURETY COMPANY thereby as fully and to the same extent as if the same were signed by the duly authorized officers of THE AETNA CASUALTY AND SURETY COMPANY, and all the acts of said Attorney (s), pursuant to the authority herein given, are hereby ratified and confirmed.

This appointment is made under and by authority of the following provisions of the by-laws of the Company which provisions are now in full force and effect and are the only applicable provisions of said by-laws.

• • • • •

IN WITNESS WHEREOF, THE AETNA CASUALTY AND SURETY COMPANY has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 20th day of February, A. D. 1936.

The Aetna Casualty & Surety Company,
By A. R. Sexton, Secretary.

(SEAL)

(Duly verified)

CITATION

(Filed January 5, 1937.)

United States of America, Greeting:

You are hereby notified that in a certain case at law in the United States District Court for the Southern District of Ohio, Western Division, wherein The Cincinnati Soap Company is plaintiff and The United States of America is defendant, an appeal has been allowed the plaintiff therein to the United States Circuit Court of Appeals for the Sixth Circuit. You are hereby cited and admonished to be and appear in said Court thirty days after the date of this citation, to show cause, if any there be, why the order and judgment appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Robert R. Nevin, Judge of the United States District Court for the Southern District of Ohio, Western Division, this 5th day of January, A. D. 1937.

Nevin,
United States District Judge,
Southern District of Ohio, Western Division.

Due personal notice of the above citation is hereby admitted this 5th day of January, A. D. 1937.

Frederic W. Johnson,
Ass't. U. S. Attorney for the United States of America, Appellee.

PRAECIPE FOR TRANSCRIPT OF RECORD

(Filed January 5, 1937.)

To The Clerk of the United States District Court for the Southern District of Ohio, Western Division:

You are hereby directed to make out and to file with the Clerk of the United States Circuit Court of Appeals

for the Sixth Circuit, a transcript of the record in the above entitled case, containing:

a. The petition.
b. The process and return.
c. The demurrer of defendant to petition.
d. The amendment to the petition.
e. The demurrer to the petition as amended.
f. The order of the Court sustaining demurrers and rendering judgment for the defendant.
g. The opinion of the Court.
h. The petition for appeal and the allowance of the appeal.
i. The assignment of errors.
j. The appeal bond and entry approving such bond.
k. The citation in appeal and the acknowledgment of service thereof.

Moulinier, Bettman & Hunt,
Attorneys for The Cincinnati
Soap Company, plaintiff.

CERTIFICATE OF CLERK

United States District Court, Southern District of Ohio, Western Division.

The Cincinnati Soap Company, a corporation under the laws of Ohio,

Plaintiff,

No. 5049. vs.

The United States of America,

Defendant.

I, Harry F. Rabe, Clerk of the District Court of the United States for the District and Division aforesaid, do hereby certify that the foregoing pages numbered from 1 to 30, inclusive, contain a true and correct copy of the record and proceedings indicated in the praecipe found on page 29 herein, as the same appear of record and on file in the office of the Clerk of said Court, in the above-entitled cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Cincinnati, Ohio, the ..... day of ....., 19.....

.....
Clerk.

(Seal)

.....
Deputy.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 15, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.